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Cross-Examining the Difficult Witness

Tips for Women Defenders Navigating Gender Dynamics In the Courtroom

Cross-examination is often the most well-honed, trusted, and useful tool for criminal defense lawyers. As well as forwarding the theory of the case already established in voir dire and opening statements, there are times that cross-examination can serve as a game changer. The vaunted experts who teach cross-examination always instruct that the cross-examiner is as much on stage, if not more, as the witness.¹

This fact has unique significance for women prac-

tioners. Although women have made considerable strides in the legal profession and almost half of the graduates of law school are now women², there are nonetheless gender dynamics at play. Therefore, it is important for women to understand those dynamics and use them to their advantage. What follows are some standard tips or rules for cross-examination, with further explanation for practitioners who wish to explore the gender dynamics.

For basic cross-examination techniques, it is hard to beat Irving Younger's *Ten Commandments of Cross-Examination*.³ Women practitioners, who often must be twice as smart to be perceived as even equally competent, should consider revising Irving's commandments to move the following three to the top: (1) preparation; (2) preparation; and (3) preparation.

Investigation as Preparation

Preparation begins before an attorney ever puts pen to paper, and long before the case is in front of the jury. One of the most important things a lawyer can do to maximize the effectiveness of any cross-examination is to see the witness in advance. A pretrial interview with the witness — in which the defense

investigator takes notes and memorializes facts salient to the theory of defense — is ideal. In this regard, a female face showing up at the door of a witness might be considerably less threatening than a male one. Moreover, women can take advantage of female archetypes — the mother or sister figure as confidant.

Whenever legally feasible, strongly consider a pretrial evidentiary hearing. Aside from getting a live preview of the evidence that will be presented at trial and locking in helpful testimony, seeing how a witness reacts in the courtroom under both direct and cross-examination can provide invaluable insight into how to control that witness before a jury.

Importance of Role Play

Another good preparation strategy is having colleagues role play the witness and the prosecutor. This exercise has the obvious benefit of forcing the defense attorney to practice questions out loud, including the

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cadence and tenor of the voice, before trying it out on the witness. Inevitably, colleagues will be even more difficult than the actual witness turns out to be.

In addition, role playing requires collaboration. At a minimum, the defense attorney will gain two new perspectives: the lawyer (or even better the lay person) who is pretending to be the witness and the lawyer who is pretending to be the prosecutor. Explaining to colleagues the theory of the case and why she expects the witness to be difficult will help the defense attorney focus and streamline the cross.

Twelve jurors will bring 12 different perspectives to the courtroom. The more input counsel seeks from colleagues and lay people, the more likely she will anticipate a potential problem in the witness testimony and be ready to counter it in a way that advances the theory of defense at trial.

Courtroom Presence — Female Swagger?

An experienced female lawyer serving as a mentor in a large public defender office once noted that when the male attorneys came back to the office to regale their colleagues with tales from the courtroom, the descriptions were always glowing, even heroic: witnesses destroyed on cross-examination and judges awed with the brilliance of legal argument. The women, on the other hand, often came back beating themselves up, loudly and publicly: laments of questions not asked and self-critiques of strategies gone awry.

Self-criticism can be a wonderfully productive tool. It allows a lawyer of any experience level to reflect thoughtfully on how his or her performance could be improved. And yet, the mentor cautioned, “Keep your self-doubts to yourself. Do not come back to the office and tell everyone about the mistakes you think you made or about how you messed up the case. If you constantly belittle your skills, others, never having actually seen you in the courtroom, will have only your critical self-reports upon which to rely. You risk becoming the lawyer you tell everyone else you are.”

What does this advice have to do with cross-examining the difficult witness? It is about confidence and courtroom presence. Few women are six feet tall with a deep baritone voice. There are few heroic women movie and television lawyers to emulate. Ally McBeal is no Atticus Finch.

In order to control the witness, the lawyer must first control the courtroom. And for women, who may be accustomed to self-deprecation and modesty, this may require a more conscious effort. Psychological studies confirm that women consistently underestimate their own abilities, particularly when doing tasks that are considered “masculine.”⁴

Rest assured, however, that having a John Wayne-type swagger is not a prerequisite to successfully controlling the courtroom or the difficult witness. And in many ways, just as in their professional lives women may feel freer to make some choices because of the differing societal expectations for women, so too, there is a certain freedom that comes from being able to choose a style other than cowboy swagger.

What is good advice for the new lawyer who is just finding her courtroom voice? It bears repeating that nothing fosters confidence and establishes presence in the courtroom better than preparation, preparation, and preparation. When the defense attorney knows the case better than anyone else in the room, when she has the impeachment documents at her fingertips, and when she is examining the witness and keeping in mind how the examination will advance the theory of defense, then inevitably she will exude confidence. Courtroom presence derives directly from that confidence.

And after she has destroyed the witness with her cross-examination, she should not be shy. She should go back and tell her colleagues how well the cross went!

Tone

Attorneys should know themselves and take advantage of their strengths. Sarcasm works for some lawyers, but not for others. Even in 2011, women lawyers may encounter jurors put off by an overly aggressive style that those same jurors would find acceptable in a man. However, women may also have some distinct advantages. There may be some styles that work more effectively for women lawyers.

The Hostile Witness

When cross-examination begins, an obnoxious witness may come across as a bully if he changes his demeanor, becomes heated and loud, and refuses to give a straight answer. No one likes a bully. At that moment, a woman’s questioning can get even quieter. “Officer,

let me repeat *my* question. Officer, the question was Officer, was that a yes or a no?” The questioning should be persistent, even relentless, but quiet and calm.

Even with a witness who is hostile and a bully, the defense attorney should not ask the judge for help in controlling the witness. During cross-examination in particular, the defense attorney is in command of the courtroom, not the judge. The people to ask for help in taming a bully are the jurors — and the defense attorney will make that appeal to them in closing argument.

The Sympathetic Witness

What tone should a lawyer take with the sympathetic witness? The first consideration with this kind of witness (rape complainant, child, grieving widow) is whether the lawyer should cross-examine at all. If there is nothing to be gained towards advancing the theory of defense, have the confidence to say, “No questions.” Get that witness out of the courtroom as soon as possible.

Sometimes, however, the complainant is mistaken or lying, and must be cross-examined. Even “real” crime victims are human beings with human foibles. Counsel must listen carefully to the answers the witness gives. Sometimes even a seemingly sympathetic witness will give the defense a gift. What kind of gift? The gift can be an unexpected fact, phrase, or word; counsel should take the gift and run with it. An example is the rape complainant who tearfully describes her fear at being held at gunpoint. “I could not take my eyes off that big scary gun,” she testifies. A gift has been given to the defense. Counsel should accept it gracefully, as she now has just what she needs for her theory of defense (misidentification). In empathetic tones, counsel should go through all of the details of that gun, which commanded the entire focus of the witness, making the identification of the defendant unreliable. Defense counsel’s confidence in knowing the facts of the case better than anyone else in the courtroom, and the preparation she has done, will give her the flexibility to accept the gift when offered and deviate from her script when the occasion presents itself.

The Evasive or Forgetful Witness

What about the evasive witness? Or the witness whose memory disappears the moment cross-examination begins?

